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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1432

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

versus

HECTOR MARTINEZ & CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
Petitioner,

versus

HECTOR MARTINEZ & CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Southern Pacific Transportation Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 8, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 606 F.2d 106 and reproduced in the Appendix. 21a. No opinion was rendered by the District Court for the Western District of Texas, but the pertinent orders of the court are reproduced in the Appendix. 15a.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 8, 1979. 32a. Timely petitions for rehearing and rehearing *en banc* were denied on December 20, 1979, 34a, and this petition for a writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

QUESTION PRESENTED

Whether a common carrier can be held liable for damages for the loss of use of goods delayed in interstate transit, absent prior notice of the possibility of such damages, on the basis that the use value of goods is an element of the owner's "actual loss" within the meaning of the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §20(11) (1976).

STATUTORY PROVISION INVOLVED

This case involves the Carmack Amendment to the

Interstate Commerce Act, which is set out verbatim in the Appendix, 1a, and is cited as follows:

> Act of Feb. 4, 1887, ch. 104, Pt. I, §20, 24 Stat. 386, *as amended*, ch. 3591, §7, 34 Stat. 593 (1906), *as amended*, ch. 176, §1, 38 Stat. 1196 (1915), *as amended*, ch. 301, 39 Stat. 441 (1916), *as amended*, ch. 91, §§436-438, 41 Stat. 494 (1920), *as amended*, ch. 761, 44 Stat. 835 (1926), *as amended*, ch. 510, §3, 44 Stat. 1448 (1927), *as amended*, ch. 208, 46 Stat. 251 (1930), *as amended*, ch. 498, §1, 49 Stat. 543 (1935), *as amended*, ch. 722, Title I, §13(b), 54 Stat. 919 (1940) (49 U.S.C. §20(11) (1976) (Repealed by Pub. L. 95-473, §4(b), Oct. 17, 1978, 92 Stat. 1466.)[1]

STATEMENT OF THE CASE

Since this case centers on a dismissal pursuant to Fed. R. Civ. P. 12(b)(6), the courts below and Petitioner (Southern Pacific) have accepted the allegations of Respondent's (Martinez') complaint as true.

On February 11, 1974, Martinez' agent delivered a dragline to the Penn Central Railroad for shipment

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1 Subsequent to the commencement of this action, the Interstate Commerce Act was enacted into positive law by Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1337. As a result of this codification, 49 U.S.C. §20(11) (1976) has been restated, without substantive change, at 92 Stat. 1453 (to be codified in 49 U.S.C. §11707). This restatement is set forth in the Appendix. 5a.

from New Philadelphia, Ohio to Eagle Pass, Texas. The dragline was disassembled and loaded in sections on five railroad cars. Penn Central issued a single uniform bill of lading for the five cars and listed Martinez' agent in Eagle Pass, Texas as the consignee. The bill of lading described the dragline as "used strip mining machinery and parts." 14a.

The cars were not transported together, and the last of the five was delivered by Southern Pacific in Eagle Pass on April 2, 1974. Had the dragline been transported with reasonable dispatch, as required by the bill of lading, the five cars would have arrived in Eagle Pass no later than March 1, 1974. Delivery of the dragline was thus delayed for 32 days.

In addition, the dragline was damaged in transit and necessary repairs were not completed by Martinez until June 20, 1974. At the time delivery was accepted, Martinez also paid certain demurrage and storage charges assessed by Southern Pacific.

Martinez subsequently brought this suit in the district court pursuant to 28 U.S.C. §1337 (1976), which, at the time, provided that the district courts had original jurisdiction of any civil action arising under any act of Congress regulating commerce, regardless of the amount involved. The act of Congress in this instance

was the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §20(11) (1976).[2]

Martinez alleged three claims under the Carmack Amendment. The first sought recovery of the cost of repairing the physical damage to the dragline. The second sought a refund of the demurrage and storage charges Martinez paid Southern Pacific. Lastly, Martinez sought damages of $117,600 for the loss of use of the dragline during the periods in which it was delayed in transit and undergoing repairs.

The parties settled the first two claims prior to judgment in the district court. Southern Pacific also filed a motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the claim for damages for loss of use on the basis that such damages were special, as opposed to compensatory, and not recoverable under the Carmack Amendment absent prior notice to the carrier of the possibility of such damages. The district court denied this motion upon condition that Martinez amend its complaint to allege such notice. 15a. When Martinez failed to amend, the motion was granted, 17a, and Martinez appealed.

As to the claim for loss of use during the period the dragline was repaired, the Court of Appeals affirmed the district court's dismissal. The Court reasoned that a

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2 28 U.S.C. §1337 was amended by Pub. L. 95-486, Oct. 20, 1978, §9(a), 92 Stat. 1633, to provide, in part, that actions brought under 49 U.S.C. §20(11) must involve in excess of $10,000 for each bill of lading.

claim for loss of use during the period of repairs was not severable from the claim for the cost of repairing the dragline, which had previously been settled. 24a. Southern Pacific does not complain of this holding or that portion of the Court of Appeals' judgment affirming the district court.

The surviving issue for the Court of Appeals was the district court's dismissal of the claim for loss of use during the delay in transit. Applying the common law principles incorporated by the Carmack Amendment, the Court assessed "the reasonable foreseeability of the plaintiff's actual injury at the time of entry into the contract — here the bill of lading." 26a. Concluding that the Carmack Amendment in compensating a party for his loss "does not restrict the measure of damages solely to the diminution in value of the goods involved," the Court of Appeals reversed and remanded the district court's dismissal of Martinez' claim for loss of use during the delay in shipment. 31a. This action is the basis of Southern Pacific's request for review by this Court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Unprecedented And Conflicts With The Decisions Of Other Courts Of Appeals As To The Measure Of Damages In A Carmack Amendment Action

For three quarters of a century the Carmack Amendment has defined and regulated the liability of common carriers who cause loss or injury to the property they transport in interstate commerce. The statute supersedes all state regulation on the subject, *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-07 (1913), and "applies to damages caused by delay in making delivery." *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28, 29 (1936).

The Amendment is straightforward and unambiguous. It provides that a carrier is liable for "the full actual loss, damage, or injury to . . . property caused by it or by any such common carrier . . . over whose line . . . such property may pass. . . ." 2a. The principal purpose of the Amendment was to preclude stipulations limiting the liability of each carrier to its own part of a through route; which often placed an impossible burden on a shipper to seek out the guilty party. *New York, P. & N. R. Co. v. Peninsula Produce Exchange*, 240 U.S. 34, 37-8 (1916). At the same time, the Amendment incorporated the existing federal common law of damages. *Adams Express Co. v. Croninger, supra* at 507-08.

Against this background, the Fifth Circuit undertook to apply principles of the common law to determine the appropriate measure of damages for delayed delivery of this machinery in breach of a condition of the bill of lading. The Court first reaffirmed the principle in *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145

(1854) "that general damages are awarded only if injury were foreseeable to a reasonable man and that special damages are awarded only if actual notice were given the carrier for the possibility of injury." 26-7a. Finding that the dragline had an "obvious . . . use value," the Court rejected those cases holding that the loss of a machine's use is not a foreseeable result of delayed transport because it is not a usual consequence of such delay. In the Court's judgment as long as the claimed damages were "not so remote as to make it unforeseeable to a reasonable man at the time of contracting," 28-9a, the Carmack Amendment "does not restrict the measure of damages solely to the diminution in value of the goods involved." 31a.

This is the first occasion on which any federal court has held that damages for loss of use, or any other type of loss distinct from an injury to the goods themselves, are recoverable under the Carmack Amendment in the absence of notice. The Fifth Circuit conceded this lack of authority when it failed to cite a Carmack Amendment case in support of the statement that "[l]ost rental value is frequently an appropriate measure of damages from a delay in shipment of machinery." 29-30a.

Moreover, the Fifth Circuit's decision is in direct conflict with *Texas Instruments, Inc. v. Branch Motor Express Co.*, 308 F.Supp. 1228 (D. Mass.), *aff'd*, 432 F.2d 564 (1st Cir. 1970). In that case a sophisticated machine was totally destroyed during transit. In addition to the machine's

fair market value, the plaintiff sought to recover $3600 paid to six employees to manually perform the task the machine would have performed, pending the arrival of a new machine. In contrast with the Fifth Circuit's opinion in this case, the First Circuit held that damages for loss of use were special damages. Such damages were not recoverable since they were not an obvious result "from any delay due to damage to the machine in transit, and defendant was never given any notice of special damages which might so result." 308 F.Supp. at 1230.

The irony of this conflict is that the Fifth Circuit cites the *Texas Instruments* decision approvingly. It is purportedly illustrative of the unforeseeable special damages which cannot be recovered absent notice to the carrier, such as "lost profits, the cost of idle labor hired to operate the dragline, [and] the cost of idle equipment that had been rented to be used with the dragline. . . ." 28a, note 7. While it is true that the plaintiff in *Texas Instruments* also sought damages falling into these categories, the Fifth Circuit ignores the essential feature of the case as it applies to this controversy; namely, the unforeseeability of damages for loss of use in the absence of notice.

An equally compelling conflict exists with the decision of the Tenth Circuit in *L. E. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F.2d 488 (10th Cir. 1964).

Plaintiff sought to recover the cost of repairing an oil drilling rig damaged by a carrier during transit and earnings lost while the rig was out of service.[3] 333 F.2d at 490. This claimed loss of earnings represented net income the rig would have earned during the seventeen-day period it was inoperable.

Regardless of the label affixed to these lost earnings, be it "net income," "lost rental value" or "interest value," there can be no doubt they represent and are but one way of measuring the "use value" referred to by the Fifth Circuit. Yet, while the Fifth Circuit has classified such damages as foreseeable and compensatory, the Tenth, like the First Circuit, held that such damages were special damages requiring notice prior to formation of the contract for carriage as a predicate to their recovery. 333 F.2d at 492. It affirmed the trial court's award of these damages precisely because the carrier had specialized capabilities and detailed knowledge of the owner's intention to use the drilling rig immediately upon delivery. *Id.* In stark contrast, Martinez could not even plead the existence of any notice to Southern Pacific of the intended use of the dragline. 17a.

The Fifth Circuit's implication of harmony with prior decisions where none exists is again illustrated by its citation of *Great Atlantic & Pacific Tea Co. v. Atchison, T. &*

3 The cost of repairs is never mentioned again in the opinion and presumably was not an issue on appeal.

S. F. R. Co., 333 F.2d 705 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965), for the critical holding that the Carmack Amendment "does not restrict the measure of damages solely to the diminution in value of the goods involved." 31a. This is not what the cited decision said, and in fact the Seventh Circuit was holding that damages under the Carmack Amendment were so restricted.

The portion of the opinion cited by the Fifth Circuit merely states that "the fair market value rule is not applied when actual damage can more nearly be ascertained by other means." 333 F.2d at 708-09. On the next page the Seventh Circuit made clear that what it sought to measure, by the fairest means possible, was nothing more or less than that to which the Fifth Circuit says the opinion did not restrict itself; namely the diminution, if any, in the value of the property.

> Unexcused and unreasonable delay in shipment does not establish, *ipso facto*, actual damage. In the absence of a showing of, e.g., decline in retail price, physical damage or deterioration, or sale at a reduced price on a 'quick-sale' counter due to delay and anticipated spoilage we fail to see how A & P has established actual damage.
>
> * * * *
>
> Unexcused and unreasonable delay establishes a wrong, but in the absence of proof of

> actual damage such wrong is not compensable under the Carmack Amendment . . . 333 F.2d at 710.

In the final analysis the Seventh Circuit held there was no actual diminution in the value of the goods involved and therefore no compensatory damages. Such was the result despite the fact the grocer operating on borrowed money whose plums are delayed in transit is sustaining a loss of "interest value" indistinguishable from that sustained by Martinez in this instance.

The decision of the Fifth Circuit is also at odds with the principle expressed in numerous decisions construing the Carmack Amendment which focus exclusively on the diminished value of the goods which have been damaged or delayed. In *Continental Can Co. v. Eazor Express, Inc.*, 354 F.2d 222 (2d Cir. 1965), the Court affirmed an award of the cost of repairing a bottle manufacturing machine damaged in transit. In *W. A. Stackpole Motor Transportation, Inc. v. Malden Spinning & Dyeing Co.*, 263 F.2d 47 (1st Cir. 1958) the First Circuit limited recovery for extensive damage to a textile machine to the cost of repairs even though the machine could not be completely repaired or operated at full capacity. *See also Kirkhof Electric Co. v. Wolverine Express, Inc.*, 175 F.Supp. 43 (W.D. Mich. 1958), *aff'd.*, 269 F.2d 147 (6th Cir. 1959). In none of these decisions did it even occur to the parties or the court that damages for loss of use might be recoverable in the absence of notice to the carrier.

To the extent this Court has indirectly considered the measure of damages under the Carmack Amendment, the focus has again been on the value of the property being transported. *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28, 29 (1936); *Gulf, Colorado, & S.F. R. Co. v. Texas Packing Co.*, 244 U.S. 31, 37 (1917). The Carmack Amendment's incorporation of the principles of the federal common law presumably includes *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903) where this Court held damages for loss of use were not compensatory or recoverable in the absence of notice.

2. The Court Below Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court, And Which Will Significantly Affect Interstate Common Carriers.

The interstate common carrier is required by law to provide transportation on reasonable request. Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1419 (to be codified in 49 U.S.C. §11101(a)). The conditions and rates applicable to interstate transportation are likewise regulated by federal law. As a result, the carrier is ordinarily not free to bargain either with respect to the risks it contractually assumes or the consideration received for the assumption of these risks. This being the case, an important policy of the Carmack Amendment is the application of uniform legal principles to a measurement of

an injured shipper's loss that bears some reasonable relation to the rate the carrier is allowed by law to charge. *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28, 29 (1936). Whatever measurement is used "should be applied in such a way as to dove-tail with the rule permitting recovery of compensatory damages only." *Missouri Pacific R. Co. v. H. Rouw Co.*, 258 F.2d 445, 447 (5th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959).

The Fifth Circuit has totally ignored this balance between the carrier's service obligations and a reasonable limitation on its liability for damage or delay. Classifying damages for loss of use as compensatory subjects the carrier to open-ended liability totally unrelated to the transportation charges or, for that matter, to the value of the goods being transported. At the same time, since the decision does not require any notice to the carrier of the injured party's special requirements, the carrier has no opportunity to decline the shipment or take precautions to avoid these extraordinary damages. *Gardner v. Mid Continent Grain Co.*, 168 F.2d 819, 822 (8th Cir. 1948).

The implications of this decision for common carriers operating in interstate commerce are obvious and ominous. By way of example, each time a shipper could persuade a jury that a shipment was unreasonably delayed in transit, even for one day, the carrier would be liable for the "interest value" referred to by the Court. 27a. This is true even though such damages would

frequently be a chimera. The dealer purchasing cars for inventory which are delayed in transit for one week would pay interest during the period of delay whether the cars were in his possession or that of the carrier. Yet the carrier could presumably escape liability for such interest charges only in the unlikely event it could establish that the dealer would not have sold the cars during the period of delay, and thus sustained no actual loss.

The consequences of the decision are compounded by its fragmentation of the measure of damages in a Carmack Amendment action. By distinguishing between "capital" or "rentable" goods which have a use value and "non-rentable" goods, the Fifth Circuit attempts to distinguish the multitude of cases concerned exclusively with the reduced value of the goods. *E.g., Reider v. Thompson*, 197 F.2d 158, 160 (5th Cir. 1952); *See* 30a, note 8. The distinction is artificial and has no support in the law or in fact. A "non-rentable" commodity may have just as much of an interest or use value to the person receiving it as this dragline did to Martinez.

Even a robust transportation industry will have difficulty coping with the uncertainty created by this decision. For the many impecunious carriers in the nation the decision will subject them to ever increasing liability as their schedules slip, and unjustifiably divert funds better spent to improve transit times. Such un-

certainty was not an intended result of the Carmack Amendment, the plain language of which clearly limits the carrier's liability to loss or injury to the property being transported. The contradictory view of the Fifth Circuit erroneously focuses on the injury to a plaintiff's business while assuming the carrier can reasonably foresee such injury whatever it may be. A definitive decision by this Court is needed to put any uncertainty to rest and to give effect to the policy of the Carmack Amendment which, prior to this decision, has been unquestioned for seventy years.

3. While the Judgment Of The Court Below Is Not Final, Certiorari Should Be Granted To Review This Important Question of Law.

Southern Pacific is aware the Court will not ordinarily exercise its certiorari jurisdiction to review a judgment remanding a case for trial. *American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893). The question of law involved here, however, is both important and clear cut. The future course of this case would be entirely controlled by the decision of the court below. Conversely, a contrary decision will terminate further litigation. If Southern Pacific's position on these issues is correct, and the decision below is in error, a carrier should be able to obtain relief by means of a Fed. R. Civ. P. 12(b)(6) motion when a plaintiff is unable to allege notice. The question is accordingly ripe for decision and qualifies for review by this court. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Act of Feb. 4, 1887, ch. 104, Pt. I. §20, 24 Stat. 386, *as amended*, ch. 3591, §7, 34 Stat. 593 (1906), *as amended*, ch. 176, §1, 38 Stat. 1196 (1915), *as amended*, ch. 301, 39 Stat. 441 (1916), *as amended*, ch. 91, §§436-438, 41 Stat. 494 (1920), *as amended*, ch. 761, 44 Stat. 835 (1926) *as amended*, ch. 510, §3, 44 Stat. 1448 (1927), *as amended*, ch. 208, 46 Stat. 251 (1930), *as amended*, ch. 498, §1, 49 Stat. 543 (1935), *as amended*, ch. 722, Title I, §13(b), 54 Stat. 919 (1940) (49 U.S.C. §20(11) (1976), (Repealed by Pub. L. 95-473, §4(b), Oct. 17, 1978, 92 Stat. 1466):

Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through

bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,*

That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, However,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be in violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to

make such order in cases where rates dependent upon and varying declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include, all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided,* Further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of actions which he has under the existing law. *Provided Further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided Further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And Provided Further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier

performing merely a switching service at the point of destination: *And Provided Further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1453 (to be codified as 49 U.S.C. §11707):

Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this sub-title. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in

the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title to receive property from a consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If a loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for

loss or injury of baggage carried on passenger trains, boats, or motor vehicles, or on trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

(d) A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State, through which the defendant carrier operates a railroad or route.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

HECTOR MARTINEZ AND CO.

versus CA No. DR-76-CA-1

SOUTHERN PACIFIC
TRANSPORTATION COMPANY

ORIGINAL COMPLAINT

Comes now HECTOR MARTINEZ AND COMPANY Citizens of Mexico, complaining of SOUTHERN PACIFIC TRANSPORTATION COMPANY, and for cause would show the Court the following:

I.

Defendant SOUTHERN PACIFIC TRANSPORTATION COMPANY is a common carrier railroad operating as such in interstate commerce and is subject to the Interstate Commerce Act (49 U.S.C.) This action is brought under the provisions of 49 U.S.C. Section 20(11). Defendant has an agent, office and place of business in Del Rio, Texas, where service may be obtained.

II.

Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1337. Venue is in this dis-

trict in accordance with 49 U.S.C. Section 20(11) as Defendant operates a line of railroad within the Western District of Texas and within the Del Rio division.

III.

On or about the 11th day of February, 1974, Plaintiff did through its agent, tender to the Penn-Central Company, also a common carrier of railroad and subject to 49 U.S.C., a shipment of one used number 2400 Lima Dragline, Model 66 for transportation and delivery to its agent, one Rodolfo Martinez, at Eagle Pass, Texas, for transport to Mexico. The Penn-Central Company issued a uniform straight bill of lading covering the shipment. Said Dragline was loaded on five railroad cars and the Penn-Central Company accepted the shipment at New Philadelphia, Ohio for transportation to Eagle Pass, Texas and routed in connection with Defendant as the delivering carrier (a true copy of the front of the Bill of Lading is attached and incorporated herein as though written word for word.) The original Bill of Lading has been previously surrendered to the Defendant along with Plaintiff's claim for damages herein, which claim was filed with the Defendant within nine months of the date of the delivery of the shipment and in accordance with the Bill of Lading contract.

IV.

Plaintiff by and through its attorney, negotiated with Defendant for settlement of its claim for dam-

ages as aforesaid from the time said claim was filed up to and including February 15, 1976, at which time the Defendant by and through its agent in Houston, Texas, orally denied said claim to Plaintiff's attorney. No declination in writing has been received by Plaintiff or its attorney from Defendant. Plaintiff presumes said claim to have been denied as of February 15, 1976, by reason of said action.

V.

Said shipment was received in good order by Penn-Central Railroad Company but when delivered to Plaintiff at Eagle Pass, Texas, was damaged requiring extensive repairs which Plaintiff alleges were reasonable and necessary and to its damage in the sum of $14,-467.00 for such repairs.

VI.

Plaintiff further alleges that Defendant and its connecting carriers, had they transported said shipments with reasonable dispatch as provided for in the Bill of Lading contract, should have delivered the same to Plaintiff or its agent at Eagle Pass, Texas, no later than March 1, 1974, which they did not do but did unreasonably delay the transportation to Plaintiff's damage. The last of said five cars arrived at Eagle Pass, Texas, on the 2nd day of April, 1974. Plaintiff further alleges that, the machinery having been damaged in transportation, an additional delay was incurred placing the machinery in operation pending the re-

pairs thereof. Plaintiff alleges that it has been further damaged in the sum of $117,600.00, which sum represents the fair rental value of the machinery during the unreasonable delay in transportation and during the completion of repairs necessary to place said machinery into operation. Said repairs were completed on the 20th day of June, 1974.

VII.

Plaintiff would further show that the five railroad cars on which the shipment was loaded were not transported together, and that Plaintiff was required to pay excessive demurrage charges in the sum of $3,472.00 because of such failure and it should have refunded to it said demurrage charges in the sum of $3,472.00. Said failure being unreasonable.

VIII.

Plaintiff has made numerous demands on said Defendant for payment of its claim as submitted, but said Defendant fails and refuses to pay the same.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited in terms of law to answer herein and that upon trial of this suit, it do have and recover from the Defendant its damages as afore alleged and in the total sum of $135,539.00 and for further relief at law to which it may show itself to be justly entitled, and costs of suit.

Respectfully submitted,

CHITWOOD, RILEY
& SNYDER, Inc.
(A Professional Corporation)
Plaintiff's Attorney

/s/ PAUL J. CHITWOOD
PAUL J. CHITWOOD
2200 Mercantile Bank Building
Dallas, Texas 75201
Phone: 748-8648

/s/ JOHN R. FOSTER
JOHN R. FOSTER
LOWREY, FOSTER, HODGE,
MURRAH & LEE
406 Del Rio National Bank
Building
Del Rio, Texas 78840
Phone: 512-775-3524

A-9

UNIFORM STRAIGHT BILL OF LADING — Original — Not Negotiable

3/71

RECEIVED subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

622 PENN CENTRAL TRANSPORTATION COMPANY 622
GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. AND WILLARD WIRTZ, TRUSTEES

CAR INITIAL: — CAR NUMBER: SEE BELOW

LOT	LEN	TY	TRAILER INITIALS	TRAILER NUMBER	LOT	LEN	TY	TRAILER INITIALS	TRAILER NUMBER	LENGTH/CAPACITY OF CAR ORDERED	LENGTH/CAPACITY OF CAR FURNISHED	WEIGHT IN TONS GROSS	WEIGHT IN TONS TARE	WAYBILL DATE	WAYBILL NO.

STOP THIS CAR FOR
AT
FOR
AT
FOR
AT

CONSIGNEE AND ADDRESS AT STOP

ORIGIN: NEW PHILADELPHIA OHIO — STATE

SHIPPER — FULL NAME OF SHIPPER:
SIGELS HAULING INC
C/O RODOLFO MARTINEZ
P.O.BOX 286
EAGLE PASS TEXAS

BILL OF LADING DATE: 02/11/74 — BILL OF LADING NO. — INVOICE NO. — CUSTOMER NO.

CONSIGNEE AND ADDRESS:
RODOLFO MARTINEZ C/O BENITO MARTINEZ
FORWARDING AGENT

DESTINATION: EAGLE PASS TEXAS — STATE OF — COUNTY OF

ROUTE (FOR SHIPPER'S USE ONLY)
PC SSW SP

DELIVERING CARRIER: SP

SHIPPER IN THE UNITED STATES REQUIRED BY SECTION 7 OF THE ACT TO APPLY AS FREIGHT OR CHARGES ON THE PROPERTY DESCRIBED HEREON — YES ☐

WEIGHED AT — GROSS — ALLOWANCE — NET

RECEIVED TO APPLY AS FREIGHT OR CHARGES ON THE PROPERTY DESCRIBED HEREON

AGENT OR CASHIER — PER

(THE SIGNATURE HERE ACKNOWLEDGES ONLY THE AMOUNT PREPAID)

CHARGES ADVANCED
$

IF CHARGES ARE TO BE PREPAID WRITE OR STAMP HERE)
"TO BE PREPAID"

Signature of Consignor

SHIPPER'S SPECIAL INSTRUCTIONS (INCLUDE ICING, VENTILATION, HEATING, MILLING, WEIGHING, ETC.)

NO. PKGS	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	COMMODITY CODE NO.	WEIGHT (SUBJECT TO CORR.)	RATE	FREIGHT	ADVANCES	PREPAID
	USED STRIP MINING MACHINERY AND PARTS PRR 459377 LF — PRR 459472 LF — NYC 500436LF — PRR 441537LG — PRR 440230 LG — TFR to CSC 4/3/74						

RECEIVED FEB 11 1974 PENN CENTRAL COMPANY DOVER OHIO

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

HECTOR MARTINEZ AND CO.

versus DR-76-CA-18

SOUTHERN PACIFIC TRANSPORTATION COMPANY

ORDER

Filed: Mar. 14, 1977

On this the 11th day of March, 1977, came on for consideration Defendant's Motion to Dismiss Under Rule 12(b)(6) Or in the Alternative for Partial Summary Judgment filed in this cause. After carefully considering the motion and the Brief in support thereof along with plaintiff's response thereto and the entire record and file of the case, the Court is of the opinion and so finds that the damages sought by the plaintiff by way of claim for compensation for loss of the use of the machinery in question are properly characterized as Special Damages. Accordingly, the issue for this Court to resolve is whether Special Damages are recoverable in the case brought pursuant to the Carmack Amendment, 49 U.S.C., Section 2011, and, if this first ques-

tion is answered in the affirmative, under what sets of circumstances are such Special Damages recoverable.

A careful review of the authorities submitted by both parties' Briefs leads this Court to the conclusion that Special Damages are recoverable in an action under the Carmack Amendment provided the plaintiff is able to establish that the claimed damages could have been reasonably contemplated by the parties at the time of the contract of carriage. *Texas Instruments, Inc. v. Branch Motor Express Company,* 308 F.Supp. 1228 (D. Mass. 1970) aff'd 432 F.2d 564 (1st Cir., 1970). This general immunity of a carrier for liability for Special Damages as recognized by the Texas Court of Civil Appeals in 1955 in the case of *Meyer v. Thompson,* 284 S.W.2d 384 (Tex. Civ. App., 1955) writ ref'd., n.r.e. "rests upon the fact that he was under no duty to foresee injuries which might result from his negligence in the absence of knowledge of the special circumstances giving rise to such injuries".

Accordingly, in the instant case, the burden is upon the plaintiff to establish that the carrier was given notice of the possibility of incurring liability of the sort claimed for delay or damage in shipping. It is, therefore, the Order of this Court that plaintiff be given fourteen (14) days from the filing of this Order to file its Amended Complaint alleging that such notice was given to or received by the defendant. Should plaintiff fail to amend its Complaint as required, this Court will

entertain defendant's reurging of its Motion to Dismiss. However, for the present time, and subject to the above, the Motion to Dismiss should be, and the same is hereby, in all things DENIED.

ORDERED AND ENTERED this 11th day of March, 1977 at Jacksonville, Florida.

/s/ JOHN H. WOOD, JR.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT
JUDGE

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

ORDER

(Number and Title Omitted)

Filed: May 6, 1977

On this the 5th day of May, 1977, came on for consideration the Motion to Reconsider filed by the plaintiff in the above styled and numbered cause. After carefully considering the motion along with the entire rec-

ord and file of the case and particularly the authorities cited in the Court's Order of March 11, 1977, the Court is of the opinion and so finds that the motion is without merit and should be denied.

This Court finds that the prevailing authority compels this Court to reach the conclusion that the damages sought by way of the rental value of the machinery in question are properly of the category of special damages and are not recoverable in the absence of notice to the defendant as discussed in this Court's Memorandum Order of March 11, 1977.

Accordingly, the Motion to Reconsider should be, and the same is hereby, in all things DENIED.

IT IS FURTHER ORDERED that in the absence of an amended pleading filed by plaintiff in accordance with the previously mentioned Order of this Court that portion of Plaintiff's Complaint urging damages for the loss rental value of the machinery is hereby in all things DISMISSED.

ORDERED AND ENTERED this 5th day of May, 1977.

/s/ JOHN H. WOOD, JR.
UNITED STATES DISTRICT
JUDGE

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

FINAL JUDGMENT

(Number and Title Omitted)

Filed: July 27, 1977

On this 27th day of June, 1977, came on to be considered the above styled and numbered cause in which Hector Martinez & Co. is Plaintiff and Southern Pacific Transportation Company is Defendant, and the parties announced to the Court that they have reached a compromise settlement of all matters in dispute which have not previously been disposed of by the Court; and that by the terms of said settlement Plaintiff Hector Martinez & Co. in consideration for payment of a certain sum of money to it by Defendant Southern Pacific Transportation Company has agreed to and hereby does release and discharge Defendant Southern Pacific Transportation Company from all claims, damages and losses resulting from the occurrence which forms the basis of the instant suit, namely the transportation and delivery of one used number 2400 Lima Dragline, Model 66, with the exception that Plaintiff and Defendant have agreed that Plaintiff does not release and discharge Defendant Southern Pacific Transportation

from its claim of damages for loss of use of said Dragline due to delay in transportation and physical damages as set forth in Paragraph VI of Plaintiff's Original Complaint and that Plaintiff reserves the right to appeal from the Court's order of May 5, 1977 and the instant final judgment dismissing said claim, and it appearing to the Court that all sums of money due Plaintiff pursuant to the above settlement have been paid by Defendant;

It is, therefore, ORDERED, ADJUDGED and DECREED that the above styled and numbered cause wherein Hector Martinez & Co. is Plaintiff and Southern Pacific Transportation Company is Defendant be and it hereby is DISMISSED WITH PREJUDICE.

It is further ORDERED, ADJUDGED and DECREED that each party bear its own costs of Court.

SIGNED this 26th day of July, 1977.

/s/ JOHN H. WOOD, JR.
John H. Wood, Jr.
United States District Judge

APPROVED AND AGREED TO
IN FORM AND SUBSTANCE:

/s/ PAUL J. CHITWOOD
Paul J. Chitwood,
Attorney for Plaintiff
Hector Martinez & Co.

/s/ HOWARD P. NEWTON
Howard P. Newton,
Attorney for Defendant,
Southern Pacific
Transportation Company

HECTOR MARTINEZ AND COMPANY,
Plaintiff-Appellant,

versus

SOUTHERN PACIFIC
TRANSPORTATION CO.,
Defendant-Appellee.

No. 77-2793

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1979.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, HILL and VANCE, Circuit Judges.

VANCE, Circuit Judge:

Martinez appeals the trial court's dismissal of his claim under 49 U.S.C. §20(11) (Carmack Amendment to the Interstate Commerce Act) for losses resulting from delay and damage in transportation by carrier Southern Pacific. The district court granted Southern

Pacific's motion under Rule 12(b)(6) to dismiss the claim for delay damages. It held that such damages are special and Martinez failed to allege that the carrier had any notice of the possibility that such damages would accrue upon a breach of contract between the parties. We reverse and remand for trial on the claim for some but not all of the damages sought.

Martinez's agent delivered a 2400 Lima Dragline, Model 66, to the Penn Central Railroad, the origin carrier, on February 11, 1974, for shipment from New Philadelphia, Ohio to Eagle Pass, Texas. The dragline was loaded onto five separate railroad cars. A single uniform bill of lading, which described the dragline as "used strip mining machinery and parts," was issued by Penn Central, listing Martinez's agent in Eagle Pass as the consignee.

The last of the five cars, which were shipped separately, arrived in Eagle Pass on April 2, 1974. Martinez had to make reasonable repairs in the amount of $14,467.00 because the dragline was damaged in transit. These repairs were not completed until June 20, 1974. Martinez also alleges delay damages in the amount of $117,600.00 because the dragline could not be used from March 1, when he contends that the last of the cars should have arrived, until June 20. The claimed sum represents the dragline's fair rental value during this period.

After filing a claim as prescribed by the bill of lading, Martinez sued Southern Pacific, which as delivering carrier is liable for all recoverable damages. Martinez framed his original complaint to allege three separate claims under the Carmack Amendment. First, Martinez sought recovery of the cost of repairing the damage to the dragline. Second, he sought the refund of certain demurrage or storage charges assessed by Southern Pacific and paid at the time of delivery. Third, Martinez sought compensation for wrongful deprivation of the dragline's use during the periods of delay in transit and of repair.

Martinez and Southern Pacific had already settled the first two of these claims, when Southern Pacific filed its Rule 12(b)(6) motion to dismiss the third claim for loss of use. Southern Pacific argues that, because such damages are special, they are not recoverable under the Carmack Amendment absent notice of the possibility of such damages. The trial court denied this motion upon condition that Martinez amend his complaint to allege such notice. When Martinez refused, the district court granted Southern Pacific's motion under Rule 12(b)(6). This ruling, which had the effect of dismissing all that remained of Martinez's suit, is the basis of this appeal.

Martinez's delay claim involves two very different items. Lost use during the period of March 1 until April 2 resulted from a delay in transit. Lost use from April 2

until June 20 resulted from repair of the damaged goods. Neither the parties nor the district court have focused on the full import of this distinction. Martinez's claimed loss during repair is not severable from the physical damage to the dragline but is a part of the same legal claim. Thus Martinez necessarily settled his claim regarding damages for the repair period when he settled his first claim for damages to the dragline. The surviving issue is the appropriate measure of damages for the claimed loss resulting from Southern Pacific's unreasonable delay in transportation.

The Carmack Amendment[1] governs Martinez's claim for damages resulting from the delay in transit. That amendment incorporates common law principles for damages. *F. J. McCarty Co. v. Southern Pacific Co.*, 428 F.2d 690, 693 (9th Cir. 1970); *L. E. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F.2d 488, 491 (10th Cir. 1964); *J & H Flyer Inc. v. Pennsylvania Rr.*, 316 F.2d 203, 205 (2d Cir. 1963). In applying that statute, we first examine the extent to which the innocent party actually has been injured by the alleged breach. This inquiry assists in determining how the innocent party can be restored to the position in which he would have

1 The Carmack Amendment, 49 U.S.C. §20(11), provides that any common carrier subject to the provisions of the Interstate Commerce Act, such as Southern Pacific, who receives property for transportation in interstate commerce shall be liable for damages it causes in the amount of "the full actual loss, damage or injury" suffered. Federal law controls our determination of liability and the measure of damages, *Dublin Co. v. Ryder Truck Lines, Inc.*, 417 F.2d 777, 778 (5th Cir. 1969), although it adopts common law principles.

been had the contract been fully performed. *See Liberty Navigation & Trading Co. v. Kinoshita & Co.*, 285 F.2d 343, 350 (2d Cir. 1960) (Lumbard, C. J., concurring in relevant part), *cert. denied*, 366 U.S. 949, 81 S.Ct. 1904, 6 L.Ed.2d 1242 (1961); 11 *Williston on Contracts* §1338, at 198 (3d ed. W. Jaeger 1968).

Normally, the remedy is an award of money damages to the aggrieved party as compensation for his economic injury.[2] This rule in effect protects the innocent party's expectation interest, giving him the "benefit of the bargain."[3] Martinez's alleged injury in this case was deprivation of the dragline's use between March 1, when it should have been delivered, and April 2. Besides compensating the injured plaintiff, the common law also seeks to protect the defendant from unforeseeable large losses to the plaintiff.[4] This limita-

2 In some situations in which money damages cannot adequately compensate the innocent party, the court may order specific performance of the contract.

3 Damages may be awarded for the expectation interest, the reliance interest, or the restitution interest of the aggrieved party. Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 Yale L.J. 52, 373 (1936-1937); J. Calamari & J. Perillo, *Contracts* §205, at 328-29 (1970). If it is impossible to calculate a plaintiff's expectation interest, courts award damages to protect his reliance interest, to restore him to his position before the contract was entered. If reliance damages do not represent a fair measure of recovery, courts calculate damages on the basis of the restitution interest, to restore the benefit received from the plaintiff's performance.

4 In addition to the foreseeability limitation, damages may also be limited because of uncertainty, *e.g.*, *United States v. Huff*, 175 F.2d

tion makes good sense. An award of full compensation for all of the plaintiff's losses due to the breach, no matter how unforeseeable or bizarre these losses are, would simply be unfair to the defendant as well as possibly paralyzing to commerce.

We next assess the reasonable foreseeability of the plaintiff's actual injury at the time of entry into the contract — here the bill of lading. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544, 23 S.Ct. 754, 47 L.Ed. 1171 (1903); *De Fore v. United States*, 145 F.Supp. 484, 491 (M.D. Ga. 1956), *aff'd sub nom. Georgia Kaolin Co. v. United States*, 249 F.2d 148 (5th Cir. 1957). Our analysis on this point begins with *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854). There, mill operators were forced to close operations to ship a broken shaft for repairs, and the carrier negligently delayed shipment. The carrier, however, had not been informed of the situation at the mill. The court refused to award profits lost during the period of delay because such damages were not in the contemplation of the parties. The court articulated the rules, still almost universally followed,[5] that general damages are awarded only if injury were foreseeable to a reasonable man and that special damages are awarded only if actual notice were

678, 680 (5th Cir. 1949), or because of failure to mitigate damages, *e.g.*, *De Fore v. United States*, 145 F.Supp. 484, 493 (M.D.Ga. 1956), *aff'd sub nom. Georgia Kaolin Co. v. United States*, 249 F.2d 148 (5th Cir. 1957).

5 J. Calamari & J. Perillo, *supra* note 3, at 329. As Professor Gilmore admonished, *Hadley* "has meant all things to all men." G. Gilmore, *The Death of Contract* 50 (1974).

given the carrier of the possibility of injury.[6] Damage is foreseeable by the carrier if it is the proximate and usual consequence of the carrier's action. 11 *Williston on Contracts, supra* §1344, at 226.

Martinez asserts that his loss resulting from the delay in shipment was reasonably foreseeable when he entered the contract to transport his dragline. *Hadley* held that the damages arising from an inoperative mill were not foreseeable results of delayed shipment of a shaft, without specific notice. It was not obvious that the shaft in *Hadley* was an indispensable element of a mill. In the instant case, however, it was obvious that the dragline is a machine which of itself has a use value. Some cases after *Hadley* have suggested that the injury resulting from loss of a machine's use are not foreseeable results of delayed transport, because it is not a usual consequence although it is a proximate consequence. *See* 11 *Williston on Contracts, supra* §1344, at 226-27. These decisions are unwarranted extensions of *Hadley* and employ arbitrary and inflexible definitions of foreseeability. Capital goods such as machinery have a use value, which may equal the rental value of the equipment or may be an interest value. The latter is

6 There are two tests for determining special damages. The more restrictive test requires proof both that notice was given of special circumstances and that the defendant impliedly or expressly assented to bearing the risk of these damages. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 23 S.Ct. 754, 47 L.Ed. 1171 (1903). The more common test rejects the added showing of a tacit agreement for special damages. *E.g., L. E. Whitlock Truck Svc., Inc. v. Regal Drilling Co.*, 333 F.2d at 492; U.C.C. §2-715, Comment 2.

ordinarily interest at the market rate on the value of the machine. It might be quite foreseeable that deprivation of the machine's use because of a carriage delay will cause a loss of rental value or interest value during the delay period.[7] *See generally*, F. Kessler & G. Gilmore, *Contracts* 1042 (2d ed. 1970). We must not lose sight of the basic common law rule, enunciated in *Hadley*, of damages for foreseeable loss. The amount of damages that was reasonably foreseeable involves a fact question that Martinez is entitled to present to a jury.

Southern Pacific replies that it was as foreseeable that the goods were to be sold as that they were to be used. This contention proves too much because *Hadley* allows recovery for harms that should have been foreseen. The general rule does not require the plaintiff to show that actual harm suffered was the *most* foreseeable of possible harms. He need only demonstrate that his harm was not so remote as to make it unforesee-

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7 Unlike loss of use, Martinez would have had to plead notice had he sought to recover for a variety of damages that could not have been foreseeable here such as lost profits, the cost of idle labor hired to operate the dragline, the cost of idle equipment that had been rented to be used with the dragline, or the daily royalties Martinez was paying for the land on which he planned to run his dragline. *Cf. Texas Instruments, Inc. v. Branch Motor Express Co.*, 308 F.Supp. 1228, 1230 (D.Mass.), *aff'd*, 432 F.2d 564 (1st Cir. 1970) (unforeseeable consequences of delay due to total destruction of machinery in transit). Thus Martinez may recover for lost use of the machine but not for the costs of the mining operations in which the machine was to be involved. Similarly, *Hadley* held that one cannot equate a shaft with the operation of an entire mill unless notice of the shaft's use had been given to the carrier. The result in *Hadley* might have been different had the plaintiff sought to recover solely for the loss of use of the shaft.

able to a reasonable man at the time of contracting. Even if the dragline were being shipped for sale it does not follow that delay in shipment would cause no recoverable loss.

Southern Pacific argues that, because only market value damages are foreseeable under common law, damages for lost rental value must be special and therefore require notice by Martinez. This argument confuses one common law method for computing damages with the underlying common law rule of awarding reasonable compensation for foreseeable injury from a contract's breach.

The common law employs a number of methods for computing damages recoverable for unreasonable delay in shipment. One of these is the market value test that measures damages by the diminution in the goods' value between the time of dispatch and the time of actual delivery. See 11 *Williston on Contracts, supra* §1342, at 223. That test, however, "is merely a method," and it "is not applied in cases where . . . another rule will better compute actual damages." *Great Atlantic & Pacific Tea Co. v. Atchison, T. & Ste. F. Ry.*, 333 F.2d 705, 708 (7th Cir. 1964), *cert. denied*, 379 U.S. 967, 85 S.Ct. 661, 13 L.Ed.2d 560 (1965). *Accord, Olsen v. Railway Express Agency, Inc.*, 295 F.2d 358, 359 (10th Cir. 1961). *Cf. Illinois Cent. Ry. v. Crail*, 281 U.S. 57, 64-65, 50 S.Ct. 180, 74 L.Ed. 699 (1930) (Cummins Amendment). Lost rental value is frequently an appropriate measure of damages from a

delay in shipment of machinery.[8] *See Resolute Ins. Co. v. Percy Jones, Inc.*, 198 F.2d 309, 312 (10th Cir. 1952). *E.g., Burlington Northern Inc. v. United States*, 462 F.2d 526, 529-30, 199 Ct.Cl. 143 (1972); *New Orleans & N. E. R. v. J. H. Miner Saw Mfg. Co.*, 117 Miss. 646, 78 So. 577, 578 (1918). In deciding which measure of damage to apply, courts look to the actual loss suffered by the plaintiff and the common law rule of compensating that loss.

> There is only one rule, of universal application, . . . and that is to give compensation for the loss suffered. Frequently, this ideal is found impossible of complete attainment; perhaps generally the market value rule is found to be the nearest approach to reaching the actual loss. But the market value rule is inapplicable when, on the facts, it is not the nearest practicable approach to an ascertainment of the actual loss. Each case must be governed by its own facts.

8 Diminution in market value is a proper measure of damages from a delay in carriage of food and other non-rentable goods. *E.g., Gulf, C., & Ste. F. Ry. v. Texas Packing Co.*, 244 U.S. 31, 37, 37 S.Ct. 487, 61 L.Ed. 970 (1917) (poultry); *Fort Worth & D. Ry. v. United States*, 242 F.2d 702, 705 (5th Cir. 1957) (livestock feed); *Reider v. Thompson*, 197 F.2d 158, 160 (5th Cir. 1952) (sheepskins). However, this test is generally not as accurate a measure of injury from a delay in transport of capital goods, with an ascertainable rental value for the machinery or interest value of the invested sum. Otherwise, a carrier could breach its contractual duties with impunity as long as the market value of the equipment did not drop, even though the shipper might lose a substantial use value or pay high installment purchase costs.

United States v. Palmer & Parker Co., 61 F.2d 455, 459 (1st Cir. 1932). The Carmack Amendment, in compensating the aggrieved party's "full actual loss," does not restrict the measure of damages solely to the diminution in value of the goods involved. *Great Atlantic & Pacific Tea Co. v. Atchison, T. & Ste. F. Ry.*, 333 F.2d at 708-09.[9]

Martinez has stated a claim for damages resulting from the delay in shipment. We reverse the district court's order of dismissal on this point, and remanded for trial. We affirm, however, the district court's decision to dismiss Martinez's claim for damages resulting from the delay during repair.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

9 This holding should hardly surprise Southern Pacific. *F. J. McCarty Co. v. Southern Pacific Co.*, 428 F.2d 690 (9th Cir. 1970) (rejecting Southern Pacific's arguments for market value test and against "special damages").

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

No. 77-2793

HECTOR MARTINEZ and COMPANY,
Plaintiff-Appellant,

D.C. Docket
versus No. DR-76-CA-18

SOUTHERN PACIFIC TRANSPORTATION CO.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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Before WISDOM, HILL and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby, remanded to the said District in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the defendant-appellee pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

November 8, 1979

A true topy.

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals,
Fifth Circuit

/s/ BRENDA HAUCK
Deputy

Dec. 28, 1979
New Orleans, Louisiana

ISSUED AS MANDATE: DEC. 28, 1979

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK
GILBERT F. GANUCHEAU, Clerk

December 20, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-2793 HECTOR MARTINEZ AND COMPANY versus SOUTHERN PACIFIC TRANSPORTATION CO.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ FRED ALFORTISH
Deputy Clerk

cc: Mr. Paul J. Chitwood
Mr. Howard P. Newton